

Title 18, Public Revenue

**Sales and Use Tax Regulations 1602, Food Products,  
and 1591, Medicines and Medical Devices**

**FINAL STATEMENT OF REASONS**

Overview/Non-Controlling Summary

**Update**

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action.

**Specific Purpose**

The purpose of the proposed amendments to California Code of Regulations, title 18, sections 1602, *Food Products* and 1591, *Medicines and Medical Devices*, respectively, is to clarify that when dietary supplement and adjunct products do not meet the definition of food under subdivision (a)(4) of section 1602, and are furnished by a physician to his or her own patient as part of a medically supervised weight loss program to treat obesity, such products are regarded as “medicine.” A new subdivision (e)(7) is added to Regulation 1591 to explain that when a dietary supplement or adjunct product does not qualify as a food product, it qualifies as a medicine under certain conditions.

**Factual Basis**

In the audit of a weight loss clinic, Board of Equalization (BOE) staff questioned how tax applied to sales of very low calorie meal replacement products. The products were in liquid or powdered form, provided 800 calories or less per day, and were furnished by a physician operating a weight loss clinic. At issue was whether sales of the products qualified as exempt sales of food or medicines.

In general, sales of food products for human consumption are exempt from tax pursuant to Revenue and Taxation Code (RTC) section 6359 unless otherwise excluded from the exemption by statute. As relevant to this issue, subdivision (c) of RTC section 6359 provides:

“For purposes of this section, “food products” do not include medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.”

Regulation 1602(a)(4) provides an example of a complete dietary food, as contrasted with a dietary supplement or adjunct, as a product that provides the user daily with at least 900 calories, 70 grams of high quality protein, and minimum daily requirements as established by the Federal Food and Drug Administration of specified vitamins and minerals. Board staff has historically used the example in 1602(a)(4) to determine the minimum number of calories, grams of protein, and other vitamins per day that a meal replacement product must provide in order to be regarded as a complete dietary food rather than a dietary supplement or adjunct. Accordingly, a sale of a meal replacement product, which provides fewer than 900 calories per day by itself, would not qualify for exemption from tax as a sale of a food product, but would be subject to tax as a sale of a dietary supplement or adjunct in the absence of another exemption.

RTC section 6369, subdivision (a)(2) provides that the sale or use of medicines furnished by a licensed physician to his or her own patient for treatment of the patient is exempt from taxation. The term “medicines” includes any substance or preparation intended for use by “internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and commonly recognized as a substance or preparation intended for that use”. Very low calorie meal replacement products meet the definition of a “medicine” because they are intended for use by internal application to the human body in the treatment of obesity, which commonly is recognized as a disease. Therefore, when these products are furnished by a physician to his or her own patient as part of a medically supervised weight loss program to treat obesity, although the sales of these products do not qualify as exempt sales of food products, the sales qualify for exemption as exempt sales of medicines.

### **Local Mandate Determination**

The Board has determined that the proposed amendments do not impose a mandate on local agencies or school districts. Further, the Board has determined that the amendments and regulations will result in no direct or indirect cost or savings to any State agency, any costs to local agencies or school districts that are required to be reimbursed under Part 7 (commencing with section 17500) of Division 4 of Title 2 of the Government Code or other non-discretionary costs or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

### **Response to Public Comment**

On September 17, 2008, the Board held a public hearing on the proposed amendments to Sales and Use Tax Regulations 1602, Food Products, and 1591, Medicines and Medical Devices. There was no public comment received at the hearing or during the public comment period. The Board adopted the amendments on September 17, 2008.

### **Small Business Impact**

The State Board of Equalization has determined that the adoption of the amendments to Regulations 1602 and 1591 will have no significant statewide adverse economic impact directly affecting small business. The adoption of the proposed amendments to these regulations will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. The amendments to the regulations as proposed will not be detrimental to California business in competing with businesses in other states. The proposed regulations may affect small business.

### **Cost Impact on Private Person or Businesses**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

### **Significant Effect on Housing Costs**

No significant effect.

### **Federal Regulations**

Regulations 1602 and 1591 and the proposed changes have no comparable federal regulations.

### **Alternatives Considered**

By its motion, the Board determined no alternative to promulgating the regulations would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective as and less burdensome to affected private persons than the adopted regulations.

### **Authority**

Section 7051, Revenue and Taxation Code

### **Reference – Regulation 1602**

Sections 6091, 6353, and 6359, Revenue and Taxation Code.

### **Reference – Regulation 1591**

Sections 6006 and 6369, Revenue and Taxation Code, and Sections 1200, 1200.1, 1204.1, and 1250, Health and Safety Code.